



weight, race, and color of his eyes and hair. (Certified Copy of Payson Justice Court Records, Ex. A to Doc. 12.)<sup>1</sup> The criminal complaint resulted from an investigation provided to the Gila County Attorney by Sgt. Tieman, a member of the Payson Police Department.

The County Attorney dismissed without prejudice the criminal complaint against the Perpetrator on April 13, 2004. In October of 2004, the Gila County Attorney brought the case to a grand jury seeking an indictment against William Cameron for the same incidents that formed the basis for the 2002 complaint against the Perpetrator. Police Officer Steve Johnson testified before the Grand Jury about the investigation conducted by Sgt. Tieman. The Grand Jury issued an indictment, but for some reason the indictment contained Plaintiff's social security number and date of birth, not the Perpetrator's. A true bill was found, and a bench warrant issued.

Plaintiff was arrested on January 10, 2010 in San Diego, California. Although Plaintiff told the authorities that they had the wrong person, Plaintiff remained incarcerated in San Diego until January 27, 2010. He was then extradited to Gila County, Arizona, where he was released from custody on February 1, 2010.

### **LEGAL STANDARD**

Defendant Town of Payson has moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all the claims against it. The Court may dismiss a complaint for failure to state a claim under 12(b)(6) for two reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell*

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<sup>1</sup>The Court may take judicial notice of matters of public record, such as court records, without converting a 12(b)(6) motion to a motion for summary judgment. *See Barron v. Reich*, 13 F.3d 1370, 1377 n.2 (9th Cir. 1994).

1 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,  
2 47 (1957)).

3 Although a complaint attacked for failure to state a claim does not need detailed factual  
4 allegations, the pleader's obligation to provide the grounds for relief requires "more than  
5 labels and conclusions, and a formulaic recitation of the elements of a cause of action will  
6 not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations of  
7 the complaint must be sufficient to raise a right to relief above a speculative level. *Id.* Rule  
8 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief.  
9 Without some factual allegation in the complaint, it is hard to see how a claimant could  
10 satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also  
11 'grounds' on which the claim rests." *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice*  
12 and Procedure §1202, pp. 94, 95(3d ed. 2004)).

13 Rule 8's pleading standard demands more than "an unadorned, the-defendant-unlawfully-  
14 harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing *Twombly*, 550  
15 U.S. at 555). A complaint that offers nothing more than naked assertions will not suffice.  
16 *Id.* To survive a motion to dismiss, a complaint must contain sufficient factual matter, which,  
17 if accepted as true, states a claim to relief that is "plausible on its face." *Id.* at 1949. Facial  
18 plausibility exists if the pleader pleads factual content that allows the court to draw the  
19 reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Plausibility  
20 does not equal "probability," but plausibility requires more than a sheer possibility that a  
21 defendant has acted unlawfully. *Id.* "Where a complaint pleads facts that are 'merely  
22 consistent' with a defendant's liability, it 'stops short of the line between possibility and  
23 plausibility of entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557).

24 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts  
25 alleged in the complaint in the light most favorable to the drafter of the complaint and the  
26 Court must accept all well-pleaded factual allegations as true. See *Shwarz v. United States*,  
27 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true  
28 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286

(1986).

**COUNT I - 42 U.S.C. §1983**

The Town of Payson argues that Plaintiff has failed to state a §1983 claim against it because Plaintiff has not alleged sufficiently that his constitutional rights were violated by a policy, practice, or custom of the Town of Payson. The only allegation in the Complaint regarding a town policy, practice, or custom reads: “The fact that incorrect identifying information made its way into the indictment and arrest warrant was due to defective, inadequate, and otherwise negligent policies and procedures of the Gila County Attorney and of the Payson Policy Department.” (Compl., Doc. 1, ¶22.)

Municipalities and other local governments, such as Defendant Town of Payson, are “persons” subject to suit under 42 U.S.C. §1983. *Monell v. Dep’t of Social Serv. of the City of New York*, 436 U.S. 658, 690 (1978). But municipalities cannot be held liable under §1983 solely on a *respondeat superior* theory. *Id.* at 691. To demonstrate municipal liability, a plaintiff must satisfy one of the following three conditions:

First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy. Whether a particular official has final policy-making authority is a question of state law. Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate’s unconstitutional decisions or action and the basis for it.

*Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)(quoting *Gillete v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)). Once the plaintiff meets one of the above conditions, he also must show that the policy/practice/custom/policy-maker decision was both the cause in fact and the proximate cause of the constitutional deprivation. *Id.*

Absent an official municipal policy, a §1983 plaintiff must show a longstanding practice or custom. Liability for a custom cannot be predicated on isolated or sporadic incidents; “it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.” *Id.*

1 A city also may be liable if it has a “policy of inaction and such inaction amounts to a  
2 failure to protect constitutional rights.” *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th  
3 Cir. 2001)(internal citations omitted). The custom or policy of inaction must be the result  
4 of a conscious or “deliberate choice to follow a course of action made from among various  
5 alternatives by the official or officials responsible for establishing final policy with respect  
6 to the subject matter in questions.” *Id.* (internal citations omitted). A city’s failure to train  
7 its employees may create §1983 liability as well, if the failure to train amounts to “deliberate  
8 indifference<sup>2</sup> to the rights of persons with whom those employees are likely to come into  
9 contact.” *Id.* The identified deficiency in training must be closely related to the ultimate  
10 injury. *Id.*

11 The Ninth Circuit Court of Appeals previously has held that a §1983 claim of  
12 municipality liability can survive a motion to dismiss even if the claim is “based on nothing  
13 more than a bare allegation that the individual officers’ conduct conformed to official policy,  
14 custom, or practice.” *Id.* at 682-83 (quoting *Karim-Panahi v. Los Angeles Police Dep’t*, 839  
15 F.2d 621, 624 (9th Cir. 1988)). But these holdings pre-date the Supreme Court’s decisions  
16 in *Twombly* and *Iqbal*. The Supreme Court has clarified that “an unadorned, the-defendant-  
17 unlawfully-harmed-me accusation” does not meet the Rule 8 pleading standards and cannot  
18 survive a motion to dismiss. *Iqbal*, 129 S.Ct. at 1949. Naked assertions of liability no longer  
19 suffice. *Id.* A plaintiff must allege “more than labels and conclusions, and a formulaic  
20 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

21 The Court finds that Plaintiff has not alleged sufficiently a municipal policy, practice, or  
22 custom that led to the deprivation of his constitutional rights. Plaintiff’s bare allegation that  
23 “[t]he fact that incorrect identifying information made its way into the indictment and arrest  
24 warrant was due to defective, inadequate, and otherwise negligent policies and procedures  
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26 <sup>2</sup>Deliberate indifference occurs when the need for more or different action “is so  
27 obvious, and the inadequacy of the current procedure so likely to result in the violation of  
28 constitutional rights, that the policymakers can reasonably be said to have been deliberately  
indifferent to the need.” *Lee*, 250 F.3d at 682 (internal citations omitted).

of the Gila County Attorney and of the Payson Policy Department,” does not suffice. The Court therefore grants the Town of Payson’s Motion to Dismiss with regard to Count I. But because the Court does not find that Plaintiff could never recover under these particular facts, the Court will allow Plaintiff to amend his §1983 allegations. Plaintiff shall have ten (10) days from the date of this Order to file an Amended Complaint that sets out more fully his alleged bases for municipal liability.

### **Counts II & III - False Arrest and Imprisonment**

Defendant Town of Payson argues that A.R.S. §12-820.05(B) gives it immunity from Plaintiff’s false arrest/imprisonment claims. A.R.S. §12-820.05(B) provides in relevant part: “A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee’s propensity for that action.” And false arrest or imprisonment is a felony in Arizona. A.R.S. §13-1303(C)(“Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest.”).

Plaintiff does not argue that, if true, his allegations do not constitute false arrest/imprisonment as prescribed by A.R.S. §13-1303(C). Nor does he argue that the Town of Payson had reason to believe its employees had a propensity for misidentifying criminal defendants. Plaintiff instead asserts that A.R.S. §12-820.05(B) requires a criminal conviction of the public employee(s) before it applies.

This Court addressed whether A.R.S. §12-820.05(B) requires a prior criminal conviction in *McGrath v. Scott*, 250 F.Supp.2d 1218 (D.Ariz. 2003). Relying on *State v. Heinze*, 993 P.2d 1090 (Ariz. Ct. App. 1999), the *McGrath* court held that A.R.S. §12-820.05(B) applies even if no criminal court previously has found that the public employee(s) committed a felony. *McGrath*, 250 F.Supp.2d at 1234. In *Heinze*, the Arizona Court of Appeals analyzed a statute, A.R.S. §41-621(L)(1), with the same exclusionary language as A.R.S. §12-820.05(B) and found that a felony conviction was not a prerequisite to the exclusion. 993 P.2d at 1094.

Other judges in this District also have found that A.R.S. §12-820.05(B) does not require a felony conviction for immunity to apply. *See, e.g., Dominguez v. Denny*, 2011 WL 905812, \*5 (D.Ariz. March 15, 2011); *Al-Asadi v. City of Phoenix*, 2010 WL 3419728, \*5 (D.Ariz. August 27, 2010). The undersigned agrees with the judges in this District who have held that A.R.S. §12-820.05(B) may provide immunity even without a prior felony conviction. By the statute's own terms, any court can make the felony determination. The Court therefore finds that the undersigned can make the felony determination in the first instance.

Because §12-820.05(B)'s immunity is "intended to protect a public entity from suit, not just liability, it should be resolved by the court at the earliest possible stage in the litigation." *Al-Asadi*, 2010 WL 3419728 at \*6. The Court finds, taking Plaintiff's allegations as true, as it must at this stage in the litigation, that the public employees' actions here constituted felonious false arrest/imprisonment. The Court therefore concludes that the Town of Payson has immunity from Plaintiff's false arrest/imprisonment claims. Accordingly, the Court grants the Motion to Dismiss with regard to Counts II and III.

#### **COUNT IV - MALICIOUS PROSECUTION**

Plaintiff alleges that the Town and its employees instigated his unlawful prosecution. Unlike Plaintiff's §1983 claim, Defendant Town of Payson's liability for the alleged state law torts may be based solely on a *respondeat superior* theory. The Town argues that Plaintiff has failed to state a malicious prosecution claim against it because neither it nor its employees were the proximate cause of Plaintiff's alleged harm.

The Town's argument borrows the "proximate cause" concept from negligence and §1983 jurisprudence. But "proximate cause" per se is not a *prima facie* element of a malicious prosecution claim. The essential elements of a malicious prosecution claim are: "(1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing damages." *Walsh v. Eberlein*, 560 P.2d 1249, 1251 (Ariz. Ct. App. 1977). Malice can be inferred from lack of probable cause. *Cullison v. City of Peoria*, 584 P.2d 1156, 1160 (Ariz. 1978). Probable cause exists if officials have "a reasonable ground of suspicion, supported by

1 circumstances sufficient to warrant an ordinarily prudent man in believing the accused is  
2 guilty of the offense.” *Walsh*, 560 P.2d at 1251.

3 Defendant Town of Payson’s proximate cause arguments perhaps are directed toward the  
4 third and sixth malicious prosecution elements – that the “defendants are the prosecutors”  
5 and “causing damages.” “Malicious prosecution actions are not limited to suits against  
6 prosecutors,” but may be brought against other people who wrongfully caused the filing of  
7 the charges. *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002); *see*  
8 *also Gonzales v. City of Phoenix*, 52 P.3d 184 (Ariz. 2002)(upholding verdict against police  
9 detective and his city employer for malicious prosecution). But if an instigator of criminal  
10 charges loses control over the case once the prosecution is started, then the instigator’s  
11 participation in the prosecution thereafter will not subject him to liability. *Walsh*, 560 P.2d  
12 at 1252. “Thus a malicious prosecution action will not lie where a prosecuting attorney is  
13 left to judge the propriety of proceeding with the charge and acts on his own initiative in  
14 doing so.” *Id.*

15 The Gila County Attorney may have assumed sole responsibility for Plaintiff’s  
16 prosecution, despite the mistakes of the Payson police officers, if the attorney acted on her  
17 own initiative after evaluating the propriety of the charges. Thus, the officers may not have  
18 been the “proximate cause” of Plaintiff’s damages because the prosecutor’s independent  
19 decision cut off their liability. At this stage in the proceedings, however, the Court cannot  
20 determine whether the county attorney acted wholly independently in making the charging  
21 decision. The Court therefore will deny the Town of Payson’s Motion to Dismiss with  
22 regard to Count IV without prejudice to the Town re-urging its arguments at a later stage in  
23 the litigation.

#### 24 **COUNT V - GROSS NEGLIGENCE**

25 Plaintiff alleges that the Defendant police officers were grossly negligent with respect to  
26 their investigation and misidentification of Plaintiff. Defendant Town of Payson argues that  
27 Plaintiff has not alleged facts sufficient to demonstrate that the Town or its employees acted  
28 with the egregiousness required for gross or heightened negligence.

1 Gross negligence differs from ordinary negligence in quality and not degree. *Walls v.*  
2 *Arizona Dep't of Pub. Safety*, 826 P.2d 1217, 1221 (Ariz. Ct. App. 1991). Gross negligence  
3 is "highly potent" and evinces a lawless and destructive spirit. *Cullison*, 584 P.2d at 1160.  
4 It is "action or inaction with reckless indifference to the result or the rights or safety of  
5 others." *Williams v. Thude*, 885 P.2d 1096, 1104 (Ariz. Ct. App. 1994). A person acts with  
6 reckless indifference if "he or she knows, or a reasonable person in his or her position ought  
7 to know: (1) that his action or inaction creates an unreasonable risk of harm; and (2) the risk  
8 is so great that it is highly probable that harm will result."

9 Ordinarily, gross negligence is an issue of fact for the jury. *Luchanski v. Congrove*, 971  
10 P.2d 636, 639 (Ariz. Ct. App. 1999). To prevail on its Motion to Dismiss, the Town of  
11 Payson must show "that under no set of facts, or inferences from those facts, could [Plaintiff]  
12 have proved that [Town Defendants'] actions constituted gross negligence." *Id.* at 640. The  
13 Court finds that the Town has not met its burden. The Town has not demonstrated that under  
14 no set of facts and inferences could Plaintiff prove that the Town Defendants acted with  
15 reckless indifference to his constitutional rights. The Court therefore denies the Town's  
16 Motion to Dismiss as to Count V without prejudice to re-urging its arguments at a later date.

#### 17 **DISMISSAL OF THE PAYSON POLICE DEPARTMENT**

18 Defendant Town of Payson argues that the Court must dismiss the Payson Police  
19 Department because the Department is not a jural entity capable of being sued. The Court  
20 agrees.

21 Federal Rule of Civil Procedure 17 provides that the law of the state where the district  
22 court is located shall dictate a party's capacity to sue or be sued. F.R.Civ.P. 17(b). The  
23 Arizona Constitution specifically confers the right to sue and be sued on municipal  
24 corporations. A.R.S. Const. Art. 14 §1. Arizona has abrogated traditional sovereign  
25 immunity with respect to the state and any political subdivision of the state. A.R.S. §12-820.  
26 Cities are "political subdivisions of the state." *City of Tucson v. Fleischman*, 731 P.2d 634,  
27 637 (Ariz. Ct. App. 1986).

28 The Court did not find an Arizona case addressing whether a city's police department is

1 also a political subdivision of the state capable of being sued. But a division of the Arizona  
2 Court of Appeals has held that the Maricopa County Sheriffs Office is a nonjural entity  
3 incapable of being sued. *Brillard v. Maricopa County*, 232 P.3d 1263, 1269 (Ariz. Ct. App.  
4 2010). This precedent strongly indicates that Arizona courts would hold that a city police  
5 department cannot be sued. Moreover, as the Arizona Court of Appeals noted in its decision,  
6 this Court consistently has held that city police departments are nonjural entities. *Id.*; *see*,  
7 *e.g.*, *Gotbaum v. City of Phoenix*, 617 F.Supp.2d 878, 886 (D.Ariz. 2008)(“Neither the  
8 Arizona legislature or the City has stated that the Police Department is a separate jural  
9 entity.”)

10 The Court therefore finds that the Payson Police Department is a nonjural entity and must  
11 be dismissed from this suit. The dismissal of the Police Department will not deprive Plaintiff  
12 of any remedies because he has sued the Town of Payson, the proper political subdivision.

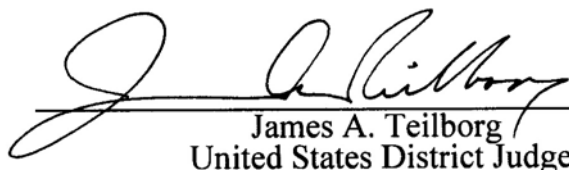
13 **IT IS ORDERED** GRANTING in part and DENYING in part Defendant Town of  
14 Payson’s Motion to Dismiss (Doc. 12). The Motion is granted as to Counts I, II, III, and all  
15 claims against the Payson Police Department. The Motion is denied as to Counts IV and V.

16 **IT IS FURTHER ORDERED** that the Plaintiff shall have ten (10) days from the date  
17 of this Order to file the Amended Complaint. Regardless of the caption or content of the  
18 Amended Complaint, the Court reiterates that the Town of Payson has immunity from  
19 Plaintiff’s false arrest/imprisonment claims and that the Payson Police Department is not an  
20 entity capable of being sued.

21 **IT IS FURTHER ORDERED** pursuant to the Notice at Docket 24, dismissing without  
22 prejudice Jane Doe Tieman, Officer Sonja Kay Davis, John Doe Davis, and Jane Doe  
23 Johnson for failure to serve.

24 DATED this 25th day of May, 2011.

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James A. Teilborg  
United States District Judge